

N THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.M.No.25024-25-CII of 2006 and
Arbitration Case No.297 of 2006(O&M)

Date of Decision: April 23, 2007.

M/s Shiv Shankar Construction Company, Rasulpur Road, Palwal

.....Petitioner.

through Mr.Kulbhushan Sharma, Advocate.

Versus

The Engineer-in-Chief, Haryana and Others

.....Respondents.

through Mr.Ranjit Saini, AAG, Haryana.

CORAM: HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE.

1. Whether Reporters of Local Newspapers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

VIJENDER JAIN, CHIEF JUSTICE (ORAL)

This petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner for appointment of an Arbitrator by this Court. The arbitration agreement is admitted between the parties. Clauses 24 and 25 of the Arbitration agreement is reads as under:-

“24. Dispute Redressal system.

24.1If any dispute or difference of any kind what-so-ever

shall arise in connection with or arising out of the contract or the execution or after the completion of works or after the termination, abandonment or breach of the contract, it shall, in the first instance, be referred for settlement to the competent authority, described along with their powers in the Contract Data. The competent authority shall, within a period of forty-five days after being requested in writing by the Contractor to do so, convey his decision to the Contractor. Such decision in respect of every matter so referred shall, subject to review as hereinafter provided, be final and binding upon the Contractor. In case the works are already in progress, the Contractor shall proceed with the execution of the works, including maintenance thereof; pending the decision of the competent authority as aforesaid with all due diligence.

24.2 Either party will have the right of appeal, against the decision of the competent authority, to the Standing Empowered Committee if the amount appealed against exceeds rupees one lakh.

24.3 The composition of the Empowered Standing Committee will be:"

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I. One official member, Chairman of the Standing Empowered Committee, not below the rank of Additional Secretary to the State Government;

II. One official member not below the rank of chief engineer; and

III. One non-official member who will be technical expert of Chief Engineer's level selected by Contractor from a panel of three persons given to him by the Employer.

24.4 The Contractor and the Employer will be entitled to present their case in writing duly supported by documents. If so, requested, the Standing Empowered Committee may allow one opportunity to the Contractor and the Employer for oral arguments for a specified period. The Empowered Committee shall give its decision within a period of ninety days from the date of appeal.

24.5. The decision of the Standing Empowered Committee will be binding on the Employer for payment of claim up to five

percent of the initial Contract Price. The contractor can accept and receive payment after claims up to five percent of the Initial Contract Price. The contractor can accept and receive payment after signing as “in full and final settlement of all claims” if he does not accept the decision, he can proceed under clause-25. Similarly, if the Employer does not accept the decision of the Standing Empowered Committee above the limit of five percent of the Initial Contract Price, he will be free to proceed under clause-25”.

25. Arbitration.

25.1 The arbitration shall be conducted in accordance with the arbitration procedure stated below:

(a) Such disputes or difference which could not be settled by way of dispute redressal system provided in clause-24 above shall be settled in accordance with the Arbitration and Conciliation Act, 1995. The Arbitral Tribunal shall consist of 3 arbitrators one each to be appointed by the Employer and the contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Government of Haryana. The Arbitrators including the Presiding Arbitrator so appointed must possess minimum educational qualification of degree in civil engineering.

If one of the parties fails to appoint its arbitrator within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then Government of Haryana shall appoint the arbitrator. A certified copy of the order of the Government of Haryana, making such an appointment shall be furnished to each of the parties.

(b) Arbitration proceedings shall be held at Chandigarh or at any place in the State of Haryana, decided by the Arbitrators in consultation with both the parties. The language of the arbitrator proceedings and that of all documents communications between the parties shall be in English.

(c) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be payable as per the arbitration act. However the expenses incurred by each part in connection with the preparation, presentation etc. of its proceeding as also the fees and expenses paid to the arbitrator appointed by such party or its behalf shall be borne by each party itself. Fees and expenses paid to the presiding arbitrator shall be borne equally by both the parties.

(d) Where the value of the contract is Rs.50 millions or below, the disputes of differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreements between the parties, failing such agreement by the appointing authority, namely by the Government of Haryana.

(e) Performance under the contract shall continue during the arbitration proceedings and payments due to the contractor by the owners shall not be withheld, unless they are the subject matter of the arbitration proceedings”.

It is the admitted case of the parties that disputes between them were to be settled under mechanism provided under Clause 24 which deals with Dispute Redressal System. The petitioner had invoked aforesaid Clause 24 by writing a letter dated 11.01.2006(Annexure P-7). No response was received from the respondents. Again the petitioner wrote a letter on 02.03.2006(Annexure P-23) for redressal of disputes, requesting the respondents, inter alia, to resolve the disputes in terms of Clause 24 of the Arbitration agreement. Again no response was received by the petitioner. Ultimately, the petitioner sent a letter dated 06.03.2006 for appointment of an Arbitrator in terms of Clause 25, as the respondents had not redressed the disputes in terms of Clause 24 of the agreement. Pursuant to the said letter, the respondents did not supply the vacancy. However, they took a stand that the alternate remedy as

provided under Clause 24 has not been exhausted by the petitioner. Mr.Ranjit Saini, Assistant Advocate General, Haryana, while referring to letter dated 09.06.2006(Annexure P-25) has contended that on account of non exhausting the remedy provided under Clause 24, the Arbitrator could not have been appointed under Clause 25 of the agreement.

The stand of the respondents is devoid of any merit. Right from letters dated 11.01.2006 and 02.03.2006(Annexure P-7 and Annexure P-23) the petitioner at the first instance requested the respondents to redress the grievances in terms of Clause 24 of the agreement. It was the respondents who did not even bother to reply to the request of the petitioner for redressing the disputes in terms of Clause 24 of the agreement. Having not redressed the grievances of the petitioner in terms of Clause 24, the respondents cannot now turn around to say that the mechanism under Clause 24 has not been exhausted and no Arbitrator can be appointed. As a matter of fact, the respondents have lost the right to supply the vacancy in terms of the agreement and also because of their non-action pursuant to the letters Annexure P-7 and Annexure P-23 written by the petitioner.

Therefore, with the consent of the parties, I appoint Sh.R.S.Jindal, retired Chief Engineer, Delhi Development Authority, as the sole Arbitrator to adjudicate upon all the disputes between the parties.

The intimation of the appointment be sent to the Arbitrator.

The Arbitrator shall fix his own fee.

Parties to appear before the Arbitrator on 19.05.2007 at 4.00 P.M.

Petition stands disposed of.

April 23, 2007
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(VIJENDER JAIN)
CHIEF JUSTICE